

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: June 27, 2007)

DO NOT PUBLISH

ROBIN PHILLIPS,	)	
as the representative of the estate of her daughter,	)	
HANNAH NESSLAGE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 99-0678V
	)	Dismissal
SECRETARY OF	)	
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
	)	

DECISION<sup>1</sup>

Petitioner, Robin Phillips (Ms. Phillips), as the representative of the estate of her daughter, Hannah Nessler (Hannah), seeks compensation under the National Vaccine Injury Compensation Program (Program).<sup>2</sup> Hannah died on March 3, 2005. *See* Petitioner's exhibit (Pet. ex.) 14 at 1. Ms. Phillips relates Hannah's death to Hannah's childhood immunizations. *See generally* Petition (Pet.); Amended Petition (Am. Pet.). In particular, Ms. Phillips asserts that Hannah sustained the onset of a seizure disorder that coincided perhaps with the administration of a Hepatitis B vaccination in February 1998. *See* Am. Pet. ¶ 3; *see also* Pet. ex. 1 at 63. Although a highly-qualified attorney with substantial Program experience represented Ms. Phillips for nearly seven-and-one-half years, Ms.

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<sup>1</sup> As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

<sup>2</sup> The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

Phillips proceeds now *pro se*. See *Phillips/Nesslage v. Secretary of HHS*, No. 99-0678V, Order of the Special Master (Fed. Cl. Spec. Mstr. Dec.8, 2006).<sup>3</sup>

Ms. Phillips pursues necessarily an actual causation theory. The United States Court of Appeals for the Federal Circuit (Federal Circuit) endorses the Restatement (Second) of Torts as a “uniform approach” to resolving actual causation issues in Program cases. *Shyface v. Secretary of HHS*, 165 F.3d 1344, 1351 (Fed. Cir. 1999). Thus, to prevail, Ms. Phillips must demonstrate by the preponderance of the evidence that (1) “but for” the administration of a vaccine listed on the Vaccine Injury Table (Table), Hannah would not have suffered a seizure disorder, and (2) a vaccine listed on the Table was “a ‘substantial factor’ in bringing about” Hannah’s seizure disorder. *Id.* at 1352, citing Restatement (Second) of Torts § 431. In addition, Ms. Phillips must demonstrate by the preponderance of the evidence that Hannah’s death was the sequela, acute complication or pathological consequence of Hannah’s seizure disorder. The preponderance of the evidence standard requires the special master to believe that the existence of a fact is more likely than not. See *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (quoting F. JAMES, CIVIL PROCEDURE 250-51 (1965)). Mere conjecture or speculation will not meet the preponderance of evidence standard. See *Centmehaiey v. Secretary of HHS*, 32 Fed. Cl. 612, 624 (1995), *aff’d*, 73 F.3d 381 (1995).

The simple temporal relationship between a vaccination and an injury, and the absence of other obvious etiologies for the injury, are patently insufficient to prove actual causation. *Grant v. Secretary of HHS*, 956 F.2d 1144, 1148-50 (Fed. Cir. 1992). Rather, long-standing, well-established Federal Circuit precedent instructs that Ms. Phillips establishes a *prima facie* actual causation case by adducing “preponderant evidence” of: “(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury.” *Althen v. Secretary of HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005); see also *Capizzano v. Secretary of HHS*, 440 F.3d 1317 (Fed. Cir. 2006); *Knudsen v. Secretary of HHS*, 35 F.3d 543, 548 (Fed. Cir. 1994), citing *Jay v. Secretary of HHS*, 998 F.2d 979, 984 (Fed. Cir. 1993); *Grant*, 956 F.2d at 1148. The “*prima facie* case” is “a party’s production of enough evidence to allow the fact-finder to infer the fact at issue and rule in the party’s favor.” BLACK’S LAW DICTIONARY 1228 (8<sup>th</sup> ed. 2004).

Congress prohibited special masters from awarding compensation “based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.” § 300aa-13(a). Numerous cases construe § 300aa-13(a). The cases reason uniformly that “special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts

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<sup>3</sup> John Nesslage (Mr. Nesslage), Hannah’s father and Ms. Phillips’s former husband, joined Ms. Phillips on the petition as a party to this case. See Pet. However, in a March 15, 2007 letter, Mr. Nesslage informed the special master that he did not wish to continue as a named party on behalf of Hannah’s estate in this case. See Letter, attached to *Phillips/Nesslage v. Secretary of HHS*, No. 99-0678V, Order of the Special Master (Fed. Cl. Spec. Mstr. Mar. 29, 2007).

alone.” *Raley v. Secretary of HHS*, No. 91-0732V, 1998 WL 681467, at \*9 (Fed. Cl. Spec. Mstr. Aug. 31, 1998); *see also Camery v. Secretary of HHS*, 42 Fed. Cl. 381, 389 (1998).

On April 13, 2007, the special master issued a final order before dismissal. *See Phillips/Nesslage v. Secretary of HHS*, No. 99-0678V, Final Order Before Dismissal (Fed. Cl. Spec. Mstr. Apr. 13, 2007).<sup>4</sup> The special master reviewed significant aspects of the procedural history in the case. *See id.* At the outset, the special master noted particularly that Ms. Phillips (through her highly-qualified attorney) had retained a medical expert in August 2006; had received a “preliminary report” from the expert by October 23, 2006; and had anticipated a “formal report” from the expert by mid- to late-November 2006. *Phillips/Nesslage v. Secretary of HHS*, No. 99-0678V, Final Order Before Dismissal at 2 (Fed. Cl. Spec. Mstr. Apr. 13, 2007), citing Status Report, filed October 23, 2006, ¶ 3. Then, the special master noted particularly that although the special master had directed the submission of the medical expert’s opinion by December 1, 2006, *see Phillips/Nesslage v. Secretary of HHS*, No. 99-0678V, Order of the Special Master (Fed. Cl. Spec. Mstr. Oct. 27, 2006), Ms. Phillips did not file the medical expert’s opinion on December 1, 2006, and had not filed the medical expert’s opinion “since December 1, 2006.” *Phillips/Nesslage v. Secretary of HHS*, No. 99-0678V, Final Order Before Dismissal at 2 (Fed. Cl. Spec. Mstr. Apr. 13, 2007). Therefore, the special master required Ms. Phillips to file the medical expert’s opinion by no later than May 18, 2007. *Id.* at 3. The special master cautioned Ms. Phillips that the special master would “dismiss immediately the petition” if Ms. Phillips did not proffer the medical expert’s opinion by May 18, 2007. *Id.*

In late April 2007, Ms. Phillips responded to the special master’s April 13, 2007 final order before dismissal. *See Letter*, attached to *Phillips/Nesslage v. Secretary of HHS*, No. 99-0678V, Order (Fed. Cl. Spec. Mstr. May 4, 2007).<sup>5</sup> Based upon her continuing search for another attorney to represent her, Ms. Phillips requested essentially an indefinite enlargement of the deadline that the special master had imposed in his April 13, 2007 final order before dismissal. *See Letter*, attached to *Phillips/Nesslage v. Secretary of HHS*, No. 99-0678V, Order (Fed. Cl. Spec. Mstr. May 4, 2007). The special master denied Ms. Phillips’s request. *See Phillips/Nesslage v. Secretary of HHS*, No. 99-0678V, Order (Fed. Cl. Spec. Mstr. May 4, 2007). Nevertheless, the special master enlarged to June 13, 2007, Ms. Phillips’s time within which to provide the medical expert’s opinion supporting the petition that was due by order on December 1, 2006. *See id.*, citing *Phillips/Nesslage v. Secretary of HHS*, No. 99-0678V, Order of the Special Master (Fed. Cl. Spec. Mstr. Oct. 27, 2006). Again, the special master cautioned Ms. Phillips that the special master would “dismiss immediately the petition” if Ms. Phillips did not proffer the medical expert’s opinion by June 13, 2007. *Phillips/Nesslage v. Secretary of HHS*, No. 99-0678V, Order at 3 (Fed. Cl. Spec. Mstr. May 4, 2007).

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<sup>4</sup> By reference, the special master incorporates his April 13, 2007 final order before dismissal into this decision.

<sup>5</sup> By reference, the special master incorporates his May 4, 2007 order into this decision.

As of the date of this decision, Ms. Phillips has not submitted a medical expert's opinion supporting the petition. Based upon the record that is before him, the special master concludes that Ms. Phillips has not prosecuted her claim. In addition, based upon the record that is before him, the special master concludes that Ms. Phillips is not entitled to Program compensation. Therefore, in the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send Ms. Phillips's copy of this decision to Ms. Phillips by overnight express delivery.

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John F. Edwards  
Special Master